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Sixth report on reservations to treaties

By Mr. Alain Pellet, Special Rapporteur

Addendum

Procedure

Consolidated text of all draft guidelines dealing with the formulation of reservations and interpretative declarations proposed in the fifth and sixth reports

2.1 Form and notification of reservations

2.1.1 Written form

A reservation must be formulated in writing.

2.1.2 Form of formal confirmation

When formal confirmation of a reservation is necessary, it must be made in writing.

[2.1.3 Competence to formulate a reservation at the international level

Subject to the customary practices in international organizations which are depositaries of treaties, any person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State or an international organization to be bound by a treaty is competent to formulate a reservation on behalf of such State or international organization.]

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[2.1.3 Competence to formulate a reservation at the international level

1. Subject to the customary practices in international organizations which are depositaries of treaties, a person is competent to formulate a reservation on behalf of a State or an international organization if:

(a) That person produces appropriate full powers for the purposes of adopting or authenticating the text of the treaty with regard to which the reservation is formulated or expressing the consent of the State or organization to be bound by the treaty; or

(b) It appears from practice or other circumstances that it was the intention of the States and international organizations concerned to consider that person as competent for such purposes without having to produce full powers.

2. By virtue of their functions and without having to produce full powers, the following are competent to formulate a reservation at the international level on behalf of a State:

(a) Heads of State, heads of Government and Ministers for Foreign Affairs;

(b) Representatives accredited by States to an international conference for the purpose of formulating a reservation to a treaty adopted at that conference;

(c) Representatives accredited by States to an international organization or one of its organs, for the purpose of formulating a reservation to a treaty adopted by that organization or body;

[(d) Heads of permanent missions to an international organization, for the purpose of formulating a reservation to a treaty between the accrediting States and that organization).]

[2.1.3 bis Competence to formulate a reservation at the internal level

The determination of the competent body and the procedure to be followed for formulating a reservation at the internal level is a matter for the internal law of each State or international organization].

2.1.4 Absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations

A State or an international organization may not invoke the fact that a reservation has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating reservations as invalidating the reservation.

2.1.5 Communication of reservations

A reservation must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty.

A reservation to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.1.6 Procedure for communication of reservations

Unless otherwise provided in the treaty or agreed by the contracting States and contracting organizations, a communication relating to a reservation to a treaty shall be transmitted:

(i) If there is no depositary, directly by the author of the reservation to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty; or

(ii) If there is a depositary, to the latter, which shall notify the States and organizations for which it is intended as soon as possible.

Where a communication relating to a reservation to a treaty is made by electronic mail, it must be confirmed by regular mail [or by facsimile].

2.1.7 Functions of depositaries

The depositary shall examine whether a reservation to a treaty formulated by a State or an international organization is in due and proper form.

In the event of any difference appearing between a State or an international organization and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of:

(a) The signatory States and organizations and the contracting States and contracting organizations; or

(b) Where appropriate, the competent organ of the international organization concerned.

2.1.8 Effective date of communications relating to reservations

A communication relating to a reservation shall be considered as having been made by the author of the reservation only upon its receipt by the State or organization to which it was transmitted.

2.2 Confirmation of reservations made when signing

2.2.1 Reservations formulated when signing and formal confirmation

If formulated when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

2.2.2 Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation[1]

If formulated when negotiating, adopting or authenticating the text of the treaty, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the reservation shall be considered as having been made on the date of its confirmation.

2.2.3 Non-confirmation of reservations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed][2]

A reservation formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed] does not require any subsequent confirmation.

2.2.4 Reservations formulated when signing for which the treaty makes express provision

A reservation formulated when signing a treaty, where the treaty makes express provision for an option on the part of a State or an international organization to formulate a reservation at such a time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

2.3 Reservations formulated late

2.3.1 Reservations formulated late

Unless the treaty provides otherwise, a State or an international organization may not formulate a reservation to a treaty after expressing its consent to be bound by the treaty unless the other contracting Parties do not object to the late formulation of the reservation.

Model clauses 2.3.1 — Reservations formulated after the expression of consent to be bound

A. A contracting Party may formulate a reservation after expressing its consent to be bound by the present treaty.

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[1] Draft guidelines 2.2.1 and 2.2.2 could be combined into a single draft guideline as follows:

Reservations formulated when negotiating, adopting or authenticating or when signing the text of the treaty and formal confirmation

If formulated when negotiating, adopting or authenticating the text of the treaty or when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a reservation must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

The Special Rapporteur is not in favour of this combination (see fifth report (A/CN.4/508/Add.3), para. 257).

[2] The alternative draftings that have been proposed relate to the fact that, as indicated in footnote 444 of the fifth report (ibid.), the term "agreements in simplified form", familiar to jurists schooled in the Roman law tradition, might bewilder those with training in common law.

B. A contracting Party may formulate a reservation to the present treaty [or to articles X, Y and Z of the present treaty] when signing, ratifying, formally ratifying, accepting or approving the treaty or acceding thereto or at any time thereafter.

C. A contracting Party may formulate a reservation to the present treaty [or to articles X, Y and Z of the present treaty] at any time by means of a notification addressed to the depositary.

2.3.2 Acceptance of reservations formulated late

Unless the treaty provides otherwise or the usual practice followed by the depositary differs, a reservation formulated late shall be deemed to have been accepted by a contracting Party if it has made no objections to such formulation after the expiry of the 12-month period following the date on which notification was received.

2.3.3 Objection to reservations formulated late

If a contracting Party to a treaty objects to a reservation formulated late, the treaty shall enter into or remain in force in respect of the reserving State or international organization without the reservation being made.

2.3.4 Late exclusion or modification of the legal effects of a treaty by procedures other than reservations

Unless otherwise provided in the treaty, a contracting Party to a treaty may not exclude or modify the legal effect of provisions of the treaty by:

(a) Interpretation of a reservation made earlier; or

(b) A unilateral statement made under an optional clause.

2.4 Procedure regarding interpretative declarations

2.4.1 Formulation of interpretative declarations

An interpretative declaration must be formulated by a person competent to represent a State or an international organization for the purpose of adopting or authenticating the text of a treaty or expressing the consent of the State or international organization to be bound by a treaty.

[2.4.1 bis Competence to formulate an interpretative declaration at the internal level

The determination of the competent body and the procedure to be followed for formulating an interpretative declaration at the internal level is a matter for the internal law of each State or international organization.

A State or an international organization may not invoke the fact that an interpretative declaration has been formulated in violation of a provision of the internal law of that State or the rules of that organization regarding competence and the procedure for formulating interpretative declarations as invalidating the declaration.]

2.4.2 Formulation of conditional interpretative declarations

A conditional interpretative declaration must be formulated in writing.

Where necessary, the formal confirmation of a conditional interpretative declaration must be effected in the same manner.

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty. A conditional interpretative declaration regarding a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.

2.4.3 *Times at which an interpretative declaration may be formulated*

Without prejudice to the provisions of guidelines 1.2.1, 2.4.4, 2.4.7 and 2.4.8, an interpretative declaration may be formulated at any time, unless [otherwise provided by an express provision of the treaty] [the treaty states that it may be made only at specified times].

2.4.4 *Conditional interpretative declarations formulated when negotiating, adopting or authenticating or signing the text of the treaty and formal confirmation*

If formulated when negotiating, adopting or authenticating the text of the treaty or when signing the treaty subject to ratification, act of formal confirmation, acceptance or approval, a conditional interpretative declaration must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty. In such a case, the declaration shall be considered as having been made on the date of its confirmation.

2.4.5 *Non-confirmation of interpretative declarations formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed]*

An interpretative declaration formulated when signing [an agreement in simplified form] [a treaty that enters into force solely by being signed] does not require any subsequent confirmation.

2.4.6 *Interpretative declarations formulated when signing for which the treaty makes express provision*

An interpretative declaration formulated when signing a treaty, where the treaty makes express provision for an option on the part of a State or an international organization to formulate such a declaration at such a time, does not require formal confirmation by the reserving State or international organization when expressing its consent to be bound by the treaty.

2.4.7 *Interpretative declarations formulated late*

Where a treaty provides that an interpretative declaration can be made only at specified times, a State or an international organization may not formulate an interpretative declaration on that treaty at another time, unless the late formulation of the interpretative declaration does not elicit any objections from the other contracting Parties.

2.4.8 *Conditional interpretative declarations formulated late*

A State or an international organization may not formulate a conditional interpretative declaration on a treaty after expressing its consent to be bound by the

treaty unless the late formulation of the declaration does not elicit any objections from the other contracting Parties.

2.4.9 Communication of conditional interpretative declarations

A conditional interpretative declaration must be communicated in writing to the contracting States and contracting organizations and other States and international organizations entitled to become parties to the treaty under the same conditions as a reservation.

A conditional interpretative declaration to a treaty in force which is the constituent instrument of an international organization or which creates a deliberative organ that has the capacity to accept a reservation must also be communicated to such organization or organ.